

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 SIXTH AVENUE, SUITE 900
SEATTLE, WASHINGTON 98101

In the Matter of:

Chemsico, Inc., A Division of
United Industries Corporation

Earth City,
Missouri,

Respondent.

ORDER
SECTION 13(a)

FEDERAL INSECTICIDE, FUNGICIDE
AND RODENTICIDE ACT

Docket No. FIFRA-10-2017-0106

I. Authority

1. This Stop Sale, Use, or Removal Order ("Order") is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by section 13(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136k(a), which authorizes the Administrator of the EPA to issue an order prohibiting the sale, use, or removal of any pesticide or device by any person who owns, controls, or has custody of such pesticide or device whenever there is reason to believe that, *inter alia*, the pesticide or device is in violation of any provision of FIFRA or the pesticide or device has been or is intended to be distributed or sold in violation of any provision of FIFRA.
2. This authority has been delegated from the EPA administrator to the EPA Region 10 Director of the Office of Compliance and Enforcement.
3. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person in any State to sell or distribute to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
4. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a "person" as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

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5. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a "pesticide," in part, as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest."
6. The regulation at 40 C.F.R. § 152.15 states that "[a] substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if: (a) [t]he person who distributes or sells the substance claims, states, or implies (by labeling or otherwise). . . [t]hat the substance . . . can or should be used as a pesticide; or . . . (b) [t]he substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than . . . use for pesticidal purpose (by itself or in combination with any other substance) . . . or (c) [t]he person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose."
7. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a "pest" as "any insect, rodent, nematode, fungus, weed, or . . . any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section [25(c)(1) of FIFRA]."
8. Section 2(p) of FIFRA, 7 U.S.C. § 136(p), defines "label" as "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." This section also defines "labeling" as "all labels and all other written, printed, or graphic matter . . . (A) accompanying the pesticide or device at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide or device."
9. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines "to distribute or sell" as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver."
10. The regulation at 40 C.F.R. § 152.3 further defines "distribute or sell" as "the acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State."
11. The regulation at 40 C.F.R. § 168.22(a) states, in part, "FIFRA sections 12(a)(1)(A) and (B) make it unlawful for any person to 'offer for sale' any pesticide if it is unregistered." The regulation further states, "EPA interprets these provisions as extending to advertisements in any advertising medium to which pesticide users or the general public have access."

II. Background

12. Chemsico, Inc., a Division of United Industries Corporation, ("Respondent") is a corporation operating within the United States. Therefore, Respondent meets the definition of a "person" in section 2(s) of FIFRA, 7 U.S.C. § 136(s).
13. Respondent's Corporate Office is located at One Rider Trail Plaza Drive, Suite 300, Earth City, Missouri 63045.

Pesticidal Claims

14. On September 27, 2016, EPA Region 10 conducted a for-cause marketplace inspection at a Lowe's Home Centers, LLC ("Lowe's") retail store at 2700 Rainier Ave South, Seattle, Washington 98144.
15. During the inspection, EPA identified the product "Black Flag Disposable Fly Trap" being "offered for sale" on Lowe's' store shelves. The product included a plastic bag (the trap) with a small pouch of light-yellow attractant powder.
16. The "Black Flag Disposable Fly Trap" label printed on the plastic bag stated, in pertinent parts:
 - Black Flag Disposable Fly Trap
 - Locate fly source outdoors. Common fly sources include garbage bins, compost piles, dog runs or kennels and campsites
 - Hang trap outdoors near fly source with included plastic tie to attract flies away from outdoor living spaces
 - Attractant in trap will dissolve in water, sending an outdoor odor to lure flies into trap
 - Hang trap in well-ventilated area to avoid odor
 - Distributed by Chemsico, Division of United Industries Corporation
17. The label also contained five EPA establishment numbers. According to the lot number on the packaging "BX-03286", the correct EPA establishment number was, "EPA Est. No. 80202-MO-1 (BX)" out of Manchester, Missouri.
18. The fly traps were sold in cut-out, cardboard boxes that stated:
 - Black Flag Disposable Fly Trap
 - Kills Insects By Drowning
 - Starts Working in Minutes

- Attracts All Major Fly Species

19. The cardboard boxes also had a graphic depicting a fly being killed by the "Black Flag" pole.

Product Composition

20. On September 15, 2016, EPA Region 10 ordered eight "Black Flag Disposable Fly Trap" units from the Lowe's website, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465>. The eight traps were from two lots, LOT# BX-05236 and LOT# BX-03286.
21. During the September 27, 2016, inspection, EPA Region 10 collected two additional "Black Flag Disposable Fly Trap" products being offered for sale on Lowe's' shelves. Both traps were from the same lot, LOT# BX-03286.
22. On September 28, 2016, EPA Region 10 shipped three "Black Flag Disposable Fly Trap" products to The Washington State Department of Agriculture's Chemical and Hops Laboratory (WSDA CHL) to be analyzed for Indole and/or Heptyl Butyrate or any other chemical attractant. The three samples included two of the eight traps purchased from the Lowe's website on September 15, 2016, (Sample No.'s 091516-F17746-001-001-CS (LOT# BX-05236) and 091516-F17746-001-002-CS (LOT# BX-03286)) and one collected during the September 27, 2016, inspection (Sample No. 092716-F17746-001-001-CS (LOT# BX-03286)).
23. On January 4, 2017, EPA Region 10 received the analytical results from WSDA CHL. The results showed that all three traps contained Indole (CAS #120-72-9) at concentrations varying between 8.10 and 11.3 percent by weight. The results also showed that each trap contained trace amounts of 2-piperidinone (CAS #675-20-7).
24. Currently, there are two EPA registered pesticides and one pending that containing Indole as the active ingredient. The concentrations of Indole in these products range from 0.2 and 0.5 percent by weight. There are no EPA registered pesticides containing 2-piperidinone.
25. For the purposes of the exemptions contained in 40 C.F.R. § 152.25(b) and (d), neither Indole nor 2-piperidinone are pheromones nor foods.

Product Distribution and Sale

26. On September 8, 2016, prior to conducting the September 27, 2016, inspection, EPA Region 10 visited the Lowe's web page, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465>.

27. The webpage offered for sale the product, "Black Flag Disposable Fly Trap." Customers could have the product delivered directly to their home or organize a pick-up at a local retail location.
28. On September 15, 2016, EPA Region 10 purchased eight "Black Flag Disposable Fly Trap" products through this site and picked them up at the Lowe's Lynnwood, Washington location.
29. On September 27, 2016, just before conducting the inspection, EPA Region 10 again visited the Lowe's webpage, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465> and noted that "Black Flag Disposable Fly Trap" products were still offered for sale.
30. During the September 27, 2016, inspection, the EPA Region 10 inspector purchased two "Black Flag Disposable Fly Trap" products at the Lowe's 2700 Rainier Ave South, Seattle, Washington location.
31. On March 26, 27, 28, 29 and 30, 2017, EPA Region 10 again visited the Lowe's webpage, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465> and noted that the "Black Flag Disposable Fly Trap" products were being offered for sale each day.
32. On January 22, 2015, the North Carolina Department of Agriculture and Consumer Services' (NCDACS) conducted a for-cause inspection on EPA's behalf at Lowe's' store located at 509 River Highway, Mooresville, North Carolina 28117.
33. According to the photographs collected by the NCDACS inspector, the product label statements were identical in all material respects to the label statements found on the products collected by EPA Region 10 on September 15, 2016, through Lowe's online retail webpage and during the September 27, 2016 inspection of Lowe's Seattle, Washington establishment.
34. During the inspection, the NCDACS identified 34 separate units of "Black Flag Fly Trap" being offered for sale on Lowe's shelves.
35. According to records collected by NCDACS, Respondent sold and distributed 2,400 units of "Black Flag Disposable Fly Trap" to Lowe's on July 12, 2015. Lowe's further transferred 48 of these units to the Mooresville retail store on October 27, 2015.

III. Basis for the Order

36. EPA has reason to believe on the basis of inspection and tests that Respondent distributed or sold and intends to distribute or sell the product "Black Flag Disposable Fly Trap" as the

term "to distribute and sell" is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) and 40 C.F.R. § 152.3.

37. The product labeling and advertisements for "Black Flag Disposable Fly Trap," as listed in paragraphs 14 through 19, render this product a pesticide as that term is defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
38. Indole does not have any significant commercially valuable use as distributed and sold other than use for pesticidal purposes. Therefore, the product composition for "Black Flag Disposable Fly Trap," as listed in paragraphs 20 through 25, render this product a pesticide as that term is defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
39. At no time relevant to this Order has the product "Black Flag Disposable Fly Trap," ever been registered as a pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.
40. Therefore, EPA has reason to believe on the basis of inspection and tests that the distribution and sale of the product "Black Flag Disposable Fly Trap," constitutes a violation of FIFRA in accordance with Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

IV. Order

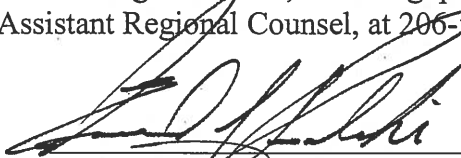
41. Pursuant to the authority of Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), EPA hereby orders Respondent to **immediately cease** the sale, use, or removal of the unregistered pesticide product "Black Flag Disposable Fly Trap," ("Violative Product") under its ownership, control or custody, wherever such products are located, except in accordance with the provisions of this Order.
42. This Order shall extend to all quantities of the Violative Product intended for sale, distribution, and/or any stocks returned to Respondent from its customers.
43. The Violative Product shall not be used, sold, offered for sale, held for sale, shipped, delivered for shipment, received, or having so received, shall not be delivered, or offered for delivery, for any reason, unless approved by the EPA in writing. Any proposal for movement of the Violative Product shall be submitted to Chad Schulze at U.S. EPA Region 10, 1200 Sixth Avenue, Suite 900 (OCE-101), Seattle, Washington 98101, or at Schulze.Chad@epa.gov, and shall include:

- (a) The purpose for which the movement is being requested;
- (b) An accounting of the quantities of product to be moved, including location(s), and quantities from each location; and

- (c) The destination location to which the product will be moved.
44. Within 30 days of receipt of this Order, Respondent must provide a written response describing the steps it will take to comply with FIFRA to Mr. Chad Schulze at U.S. EPA Region 10, 1200 Sixth Avenue, Suite 900 (OCE-101), Seattle, Washington 98101, or at Schulze.Chad@epa.gov. Mr. Schulze may be reached by telephone at (206) 553-0505. Respondent shall include in the written response a current inventory of all Violative Products. The inventory shall specify the location(s) where the products are held and quantities.
45. Respondent may seek federal judicial review of the Order pursuant to Section 16 of FIFRA, 7 U.S.C. § 136n. The issuance of this Order does not constitute a waiver by the EPA of its remedies, either judicial or administrative, under FIFRA or any other federal environmental law to address this matter or any other matters of unlawful acts not specified in this Order.
46. Any person violating the terms or provisions of this Order is subject to penalties under Section 14 of FIFRA, 7 U.S.C. § 136l.
47. This Order is effective immediately upon receipt by Respondent or any agents of Respondent.
48. This Order shall remain in effect unless and until revoked, terminated, suspended, or modified in writing by EPA.
49. If any provision or provisions of this Order is/are subsequently held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby and they shall remain in full force and effect.

V. Other Matters

50. For any additional information about this Order, please contact Mr. Chad Schulze at 206-553-0505. For any legal matters concerning this Order, including questions from legal counsel, please contact Brett Dugan, Assistant Regional Counsel, at 206-553-8562.



Edward J. Kowalski, Director
Office of Compliance and Enforcement